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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 297

GRAHAM-WHITE SALES CORPORATION, a foreign corporation, and D. ALLCOTT KELLY, as President of Graham-White Sales Corporation,

Appellants,

vs.

THE PRIME MANUFACTURING COMPANY, a corporation,

Appellee.

On Appeal from the Supreme Court of the State of Wisconsin

JURISDICTIONAL STATEMENT AND APPENDIX

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Wisconsin entered on February 4, 1958, affirming an Order of the Circuit Court for Milwaukee County, Wisconsin, rehearing denied on April 8, 1958, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Wisconsin Supreme Court is reported in 3 Wis. (2d) 156, 87 N.W. (2d) 788. The opinion of the Circuit Court for Milwaukee County was not reported. Copies of both opinions and the judgment of the Wisconsin Supreme Court are attached hereto as Appendix A.

JURISDICTION

The Circuit Court entered an Order denying the motion of Appellants to set aside and quash service effected by the delivery of a copy of the summons to D. Allcott Kelly, as President of Graham-White Sales Corporation, in so far as such delivery purported to confer jurisdiction upon said Court over Graham-White Sales Corporation. The Wisconsin Supreme Court on appeal entered judgment on February 4, 1958, affirming said Order. Appellants filed a timely motion for rehearing which was denied on April 8, 1958. Notice of Appeal herein was filed in the Wisconsin Supreme Court on June 26, 1958.

The jurisdiction of the Supreme Court of the United States to review the judgment by direct appeal is conferred by Title 28, United States Code, §1257 (2), in that the Wisconsin Supreme Court decided in favor of the validity of Wisconsin Statute 262.09 (4) (a) as applied to the particular facts involved and rejected the contention that such application would make the statute void under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal under such circumstances. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282; *Jamison v. Texas*, 318 U. S. 413; *Poulos v. New Hampshire*, 345 U. S. 395.

STATUTE INVOLVED

Wis. Stat. 262.09 (4) is the only statute involved on this appeal. The statute is printed in 2 Wisconsin Statutes of 1957 and reads:

> "If the defendant is a foreign corporation (including one created by or under any act of Congress) and (a) is doing business in Wisconsin at the time of service, or (b) the cause of action against it arose out of the doing of business in Wisconsin, service may be made in accordance with the provisions of s. 180.825 or by delivering within or without the state a copy of the summons to any officer, director or managing agent of the corporation."

The constitutionality of part (b) of the statute is not involved. The record contains no finding that any cause of action arose out of the doing of business in Wisconsin because no complaint even purporting to allege a cause of action was or ever has been served.

QUESTION PRESENTED

Does Wisconsin Statute 262.09 (4) (a) violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when applied to delivery of a copy of the summons at a time when all activity of the foreign corporation in Wisconsin of any character had ceased except (a) a rental obligation under a written lease of space in an office building and (b) ownership of some office furniture continued, and (c) a telephone answering service referred all business callers to the corporate office in Salem, Virginia?

STATEMENT OF CASE

D. Allcott Kelly (hereinafter referred to as "Kelly") is a resident of Milwaukee, Wisconsin. Graham-White Sales Corporation of Salem, Virginia, a Virginia corporation (hereinafter referred to as "Sales Corporation") was organized in August of 1956 (R. pp. 43, 79) for the purpose of selling equipment manufactured by another company. Kelly is President and director of the Sales Corporation. (R. p. 48)

The summons was delivered to Kelly, as President of the Sales Corporation, on May 24 and June 3, 1957.

Kelly terminated his employment with appellee on March 15, 1957, (R. pp. 77, 81) and commenced giving his full time to the business of the Sales Corporation. (R. p. 81) Exclusive of Kelly, Miss Peplowski, Kelly's secretary when he worked for appellee, was the only employee of the Sales Corporation in or for Wisconsin. (R. p. 83)

The Sales Corporation intended to establish a district sales office in Wisconsin. (R. pp. 43-44) The Sales Corporation, by Kelly as President, and Kelly, individually, leased for three years two rooms in an office building in Milwaukee, Wisconsin, to commence October 1, 1956. (R. p. 14) There was no activity in the office until after January 1, 1957, (R. p. 96) except perhaps the installation of some office furniture. (R. p. 97) In January of 1957 a request was made for installation of a telephone in the leased premises and for listing of the Sales Corporation in the Milwaukee telephone directory to be published in April of 1957. (R. p. 85) Telephone service actually was initiated February 1, 1957. (R. p. 86)

The Sales Corporation undertook preliminary and preparatory work on sales literature (R. p. 44) and sent to

the trade on March 24 (R. p. 55) an advertising "flyer" which indicated the leased premises in Milwaukee as an office to which *inquiries* were to be directed. (Exhibit F. R. p. 165) The trade also was advised by letter under date of March 25, 1957, from Milwaukee, Wisconsin, to address all *orders* to the Graham-White Sales Corporation, Salem, Virginia. (R. pp. 59-60) Appellee's officers allege an order solicited by Kelly in LaGrange, Illinois, resulted in a shipment by the Sales Corporation to an Illinois customer on March 19, 1957. (R. pp. 17-18)

There was considerable use of the Milwaukee telephone the latter part of March (R. pp. 89, 100) and during the month of April, (R. pp. 89-92, 100) and even extending into May. (R. p. 100) However, after May 15, 1957, all business transactions of the Sales Corporation in Wisconsin had terminated (R. pp. 44-45), i.e., ceased prior to the delivery of the copy of the summons to Kelly on May 24, 1957. One of the appellee's officers in an affidavit merely stated that Kelly and Miss Peplowski were physically in the Milwaukee office on Sunday, May 26, 1957. (R. p. 50) Liability for payment of rent continued under the office lease (R. pp. 44, 97) and the office furniture was still in the leased premises. (R. p. 97) Because the telephone listing directed callers to contact the Kelly residence in event of no answer from the office telephone (R. p. 86), on April 22, 1957 a telephone answering service was employed (R. p. 94) which advised all telephone callers to contact the Sales Corporation at its office in Salem, Virginia, (R. p. 45) and after May 15, 1957 the postal authorities forwarded all mail addressed to the Sales Corporation in Milwaukee to its office in Salem, Virginia. (R. pp. 44-45)

In the State of Wisconsin any challenge by a foreign corporation to delivery of a summons on the basis that the

foreign corporation was not "doing business in Wisconsin" as required by §262.09 (4) necessarily draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States if applied to the challenging corporation.

The Wisconsin Supreme Court so held in the instant case:

> "The question is whether at the time of the service of the summons in this action on D. Allcott Kelly, as president of the Graham-White Sales Corporation—May 24, 1957 or June 3, 1957—the corporation was doing business [under §262.09 (4)] in Wisconsin.
>
> In the recent case of *Behling v. Wisconsin Hydro Electric Co.* (1957), 275 Wis. 569, 572, 573, 575, — N.W. (2d) —, this court, stating that 'Questions of jurisdiction acquired by the service of process on a foreign corporation depend upon whether or not there has been compliance with the due process provision of the federal constitution,' regarded as controlling *International Shoe Co. v. Washington* (1945), 326 U.S. 310,
>
> * * *
>
> The facts in this case do not warrant any suggestion of 'unfair play'." (See Appendix A, pp. 15-6, R. pp. 171-172).

And in the more recent case of *Huck v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 4 Wis. 2d 132, 133, 90 N.W. 2d 154, 156 (1958) an interpleaded defendant also moved to quash service on the ground that it "* * * was not 'doing business in Wisconsin' at the time of such service within the meaning of the statute." Such challenge drew in question the validity of §262.09 (4) under the United States Constitution, the Court stating *inter alia* at pages 135-141:

"As will be developed later in this opinion, we are satisfied that a holding by this court, that such business activities carried on in Wisconsin constitute the 'doing of business' within the state within the meaning of sec. 262.09 (4), Stat., *does not offend* either the commerce clause of the United States constitution or the *due process requirement of the Fourteenth amendment.*

* * *

We have no hesitancy in holding that the objective of the statute was to give citizens of Wisconsin the right to make use of the courts of this state in instituting causes of action against any foreign corporation, which actually is carrying on business activities within the state, *subject only to such limitations as are imposed by the United States constitution.*

* * *

We will now consider the question of whether courts of a state can assert jurisdiction over a foreign corporation whose only activities in such state consist of solicitation of business, and the maintaining of an office to facilitate such solicitation, *without violating the United States Constitution.*

* * *

It is our considered judgment that the solicitation activities of Rock Island in this state were of such substantial and extensive nature as to constitute the doing of business within the state under the provisions of sec. 262.09 (4), Stats., and we so hold." (Italics supplied)

Unlike many other jurisdictions, the Wisconsin statute is coextensive with federal due process, and any decision of a Wisconsin court holding that a foreign corporation "is doing business in Wisconsin at the time of service" as required under §262.09 (4) (a) *necessarily* draws in question the validity of the statute under federal due

process and decides in favor of its validity. Thus the judgment of the Wisconsin Supreme Court in the instant case is directly appealable under Title 28 USC §1257 (2).

Nevertheless, appellants had certified as part of the record the briefs on appeal to the Wisconsin Supreme Court. These briefs disclose that appellants did expressly contend that §262.09 (4) (a) would be void under federal law if applied by the court to the particular facts involved. (R. pp. 29, 157, 180.) In view of *Memphis Gas Co. v. Beeler,* 315 U.S. 649, 651, it also is advisable to again emphasize that the Wisconsin Supreme Court passed upon and decided the issue arising under the United States Constitution to the extent required for this direct appeal under Title 28 USC §1257 (2) and Rule 15-1 (d) of this Court. (See Appendix A, p. 16, R. p. 172).

THE QUESTION IS SUBSTANTIAL

The foregoing demonstrates that the nature of the instant case and the ruling of the Wisconsin Supreme Court applying §262.09 (4) (a) to the particular facts involved is such as to bring the case within Title 28 USC §1257 (2) as construed by this court in *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, and other cases cited above under the heading of "Jurisdiction".

We also submit that the question presented by this appeal is substantial.

This court in *International Shoe Co. v. Washington,* 326 U.S. 310 redefined the basis of state judicial power over foreign corporations and announced the "minimum contacts—fair play" basis for testing state jurisdiction. From the facts, however, it is evident that the precise,

actual jurisdictional question decided was that such jurisdiction exists under the newly defined basis where (1) a foreign corporation's continuous solicitation activities in a state produced a substantial volume of business in the state, and (2) the cause of action sought to be enforced arose out of such activities.

In the recent case of *McGee v. International Life Ins.* Co., 355 U.S. 220, 223, this Court again emphasized the fact that the suit *was based* on a contract which had a substantial connection (contact) with the State of California. This decision and *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-448 clearly indicate that traditional notions of fair play and substantial justice require more substantial contacts with a state in suits based upon causes of action not arising out of the foreign corporation's activities within the state. The instant case falls within such category of cases since the Wisconsin courts did not and could not find on the basis of this record that appellee's cause of action arose out of contacts in Wisconsin.

Because of the absence of such finding, coupled with the failure of the record to disclose anything inconsistent with the contention that the Sales Corporation had ceased doing business in Wisconsin before delivery of the summons to Kelly, if any such business activity ever occurred, the decision of the Wisconsin Supreme Court in the instant case violates *traditional* notions of fair play and substantial justice.

State courts, and especially the Wisconsin Supreme Court, have been prone to uphold service of process upon a foreign corporation. Federal due process, however, prescribes a minimum standard. There is a point below which state courts cannot go even under the broad "minimum contacts—fair play" rule. The Wisconsin Supreme

Court journeyed well beyond such point and any other known judicial decision in its written opinion filed on February 4, 1958 in this case.

We submit that the question presented by this appeal is so substantial as to require briefs on the merits and oral argument for its resolution. A determination of such question by this Court undoubtedly will erase much of the difficulty encountered by the bench and bar in this field of law regardless of the ultimate decision reached on this particular appeal.

Respectfully submitted,

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APPENDIX A

JUDGMENT APPEALED FROM

On the 4th day of February, A.D. 1958, the same being the 42nd day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

The Prime Manufacturing Company, a corporation,
Respondent,
v.
D. Allcott Kelly and Graham-White Sales Corporation, a foreign corporation,
Appellants,
Lilian B. Kelly, Virgil L. Frantz, Sr., Stella Peplowski, and Virgil L. Frantz, Sr. and Betty F. Roberts, Co-partners doing business as Graham-White Manufacturing Company, and Betty F. Roberts,
Defendants.

Milwaukee Circuit Court.

Opinion by Chief Justice Martin.

This cause came on to be heard on appeal from the order of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court, that the order of the Circuit Court of Milwaukee County, appealed from in this cause, be, and the same is hereby, affirmed.

OPINION OF WISCONSIN SUPREME COURT

(Caption omitted)

Appeal from an order of the circuit court for Milwaukee county: Myron L. Gordon, Circuit Judge. *Affirmed.*

Action commenced by plaintiff Prime Manufacturing Company against defendants D. Allcott Kelly, Graham-White Sales Corporation and others, by service of a summons and discovery pleadings on Kelly, as an individual, as president of the Sales Corporation and also as agent for another defendant, Graham-White Manufacturing Company, on May 24, 1957. On June 3, 1957 the summons was again served upon Kelly in the same capacities. Thereafter Graham-White Sales Corporation and Kelly, as its president, appearing specially, served and filed an order to show cause why said service should not be quashed and set aside in so far as it purported to confer jurisdiction upon the court over the Graham-White Sales Corporation. Said defendants also applied for suppression of the proposed discovery examination of Kelly in his position as officer or agent and for limitation of such examination as to his individual position. From an order denying the motion to set aside the service and to suppress the adverse examination, defendants Kelly and the Sales Corporation appeal.

The facts will be stated in the opinion.

Martin, C. J. Plaintiff Prime Manufacturing Company is a Wisconsin corporation and it has for many years engaged in the business of selling to railroads sander equipment, solenoid valves, drain valves and bell ringers which it purchased from Graham-White Manufacturing Company of Salem, Virginia under an oral arrangement. For many years prior to March 15, 1957 D. Allcott Kelly was employed by plaintiff as "assistant to the president."

Kelly was in charge of resale of railroad equipment purchased by plaintiff from the Graham-White Manufacturing Company.

Graham-White Sales Corporation was incorporated in Virginia in August, 1956. Kelly was president and a director of the Sales Corporation. By a lease dated August 20, 1956 Kelly and the Sales Corporation rented offices in the Colby-Abbott Building at 759 North Milwaukee Street in Milwaukee. According to its terms the lease was to run from October 1, 1956 to September 30, 1959 with the option to renew for successive three-year periods. Subsequently by agreement the commencement date of the lease was extended to October 15, 1956. Sometime after the first of the year the suite was occupied by personnel and a typewriter and some office furniture and crates were moved in. The president of the office building company testified at the hearing on June 21, 1957 that the furniture was still there up to a couple of days before the hearing and that the rent was being paid and the lease was in full force and effect as of the date he testified.

On February 1, 1957 the Wisconsin Telephone Company installed telephone service for Graham-White Sales Company in the leased premises and made two additional listings, one, if no answer call Woodruff 2-5356 (later corrected to Woodruff 2-2737), and the second, for D. Allcott Kelly. The business address listed was 759 North Milwaukee Street. The Kelly residential listing was Woodruff 2-2737. On March 21st the Telephone Company placed Graham-White Sales Company in the classified list under "Railroad Supplies," and made the listing correction, if no answer call Woodruff 2-2737. On March 25th the listing of the Sales "Company" was

changed to Graham-White Sales Corporation and another listing was added for Graham-White Manufacturing Company. At the hearing on this motion on June 21, 1957 the manager of the Telephone Company testified that the service was still in effect. The Telephone Company records showed five local calls made from these listings (Broadway 6-9520 and 6-9521) in March, 1957; seventy-five such calls in April and forty-seven in May. Its records also showed numerous long distance calls made and received and telegrams sent under these listings during March and April, 1957. On April 22, 1957 the Sales Corporation put in an answering service.

Exhibit F, an advertisement of the Graham-White Sales Corporation for railroad locomotive equipment, published on March 24, 1957, contains the following:

> "Address inquiries to:
> 759 North Milwaukee St.
> Milwaukee 2, Wisconsin
>
> Telephone
> Broadway 6-9520"

The statute involved is:

Sec. 262.09(4) "If the defendant is a foreign corporation (including one created by or under any act of Congress) and (a) is doing business in Wisconsin at the time of service, or (b) the cause of action against it arose out of the doing of business in Wisconsin, service may be made in accordance with the provisions of s. 180.825 or by delivering within or without the state a copy of the summons to any officer, director or managing agent of the corporation."

The question is whether at the time of the service of the summons in this action on D. Allcott Kelly, as president of the Graham-White Sales Corporation—May 24, 1957 or June 3, 1957—the corporation was doing business in Wisconsin.

In the recent case of *Behling v. Wisconsin Hydro Electric Co.* (1957), 275 Wis. 569, 572, 573, 575, N.W. (2d), this court, stating that "Questions of jurisdiction acquired by the service of process on a foreign corporation depend upon whether or not there has been compliance with the due-process provision of the federal constitution," regarded as controlling *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 319, 66 Sup. Ct. 154, 90 L. Ed. 95, where it was said:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due-process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations. Cf., *Pennoyer v. Neff, supra; Minnesota Commercial Assn. v. Benn,* 261 U.S. 140.
>
> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

Since the decision in the *International Shoe Case* the test of "doing business" for purposes of jurisdiction over a foreign corporation has been substantially liberalized so that, as stated in 18 Fletcher, Cyc. Corporations (Perm. Ed.), sec. 8711, p. 389:

> " * * * all that is required is that the foreign corporation have 'certain minimum contacts with the

> forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' Hence the old cases construing 'doing business' no longer can be considered completely authoritative."

The facts in this case do not warrant any suggestion of "unfair play."

In the *Behling Case, supra* (p. 576), this court applied the rule stated in an annotation in 146 A.L.R. 961, as follows:

> " 'While it is a generally accepted proposition that the fact that an office is maintained in a state for the facilitation of the sales of a foreign corporation, at least in the sense of making it more convenient for its salesmen to solicit orders for outside goods, will not, of itself, make the corporation amenable to service of process, *very little more* is needed, according to the cases, to establish that the corporation is "doing business" within the state, for this purpose. (And some of the courts have indicated that an aggregate of activities, no one of which would in itself be sufficient to subject the corporation to state jurisdiction, may do so, particularly if the volume of corporate business in the state is continuous and substantial, principally upon the authority of *International Harvester Co. v. Kentucky* * * *)' " (Emphasis supplied)

See, also, discussion in 1956 Wisconsin Law Review, 522.

Appellants maintain that all business activities at the Milwaukee office ceased prior to May 15th.

Kelly is president of the Sales Corporation and he resides in Milwaukee. He leased offices in the Sales Corporation's name for a three-year period with option to renew. Office furniture and equipment was moved in.

The space was occupied and used by him and by Stella Peplowski, who was his secretary and close associate while both were employed by the plaintiff. Two telephone lines and four business listings were maintained and used at this office by the Sales Corporation. There is no showing that it attempted to close the office or discontinue the telephone service; both the lease and the telephone service were in effect at the time of the hearing.

In 17 Fletcher, Cyc. Corporations (Perm. Ed.), sec. 8487, p. 529, it is noted that while a foreign corporation is not necessarily doing business in the state because it secures a lease of a building there,—

> "Of course, the foreign corporation would be doing business in the state where it actually uses the leased premises in its regular corporate business. * * *"

The trial court was justified under the testimony produced at the hearing in finding that the offices were in use by the Sales Corporation. The fact that it did little business is of no concern. Under the decision in *Petition of Northfield Iron Co.* (1938), 226 Wis. 487, 277 N.W. 168, the test of "continuous activity" can be met by showing that a continuous course of business was contemplated, even though little activity had taken place. The Sales Corporation was ready to accept, and had equipped and manned itself so that it could accept, and act upon, any order or business which might come into the office.

So far as the installation of a telephone answering service is concerned, the trial court correctly observed that the use of such a service is not indicative of an intention to abandon the office or the business, but is consistent with the continuation of the business. It is not denied that the advertisement, Exhibit F, was a publication "to the trade,"

as alleged in the affidavit of plaintiff's secretary; the advertisement directs that all inquiries be addressed to the Milwaukee office. There is no evidence of any publication to the trade advising that the Milwaukee office is closed and that inquiries should be addressed elsewhere. Kelly admits in one of his affidavits that he used the office and the telephone service in handling inquiries addressed there.

These activities constitute at least the "very little more" than the maintenance of an office for convenience in the solicitation of orders, required under the rule, and the trial court was warranted in holding that the Sales Corporation was amenable to service in Wisconsin on May 24 and June 3, 1957.

By the Court. Order affirmed.

OPINION OF TRIAL COURT

(Caption omitted)

A summons together with discovery pleadings were served on Kelly, according to one Anton's affidavit, on May 24, 1957; this purported to be service on Kelly as an individual, as president of the Graham-White Sales Corporation and also as agent for Graham-White Manufacturing Company. For reasons which are not disclosed, the summons was again served on June 3, 1957, by one Zaidins, upon Kelly in the two alleged representative capacities.

There are thus on file two separate purported services upon the Graham-White Sales Corporation and the Graham-White Manufacturing Company, but no evidence of service on Lilian B. Kelly, Virgil L. Frantz, Sr., Stella Peplowski, or Betty F. Roberts.

Challenge to the jurisdiction is made via special appearance by the Graham-White Sales Corporation and the Graham-White Manufacturing Company. There is also an application for suppression of the proposed discovery examination of Kelly in his position as officer or agent and also the limiting of such examination as to his individual position.

I. The Special Appearances

The special appearance of the Graham-White Sales Corporation must be overruled; the special appearance of Frantz and Roberts doing business as Graham-White Manufacturing Company must be sustained.

The Graham-White Sales Corporation was, in my opinion, "doing business" in Wisconsin within the meaning of section 262.09(4). It is clear that the president of the Graham-White Sales Corporation was personally served within this state; we are not dealing with the case of service upon a minor sales representative or a subordinate official. It is also reasonably clear that the corporation over which Kelly presided was engaging in enough business activity in this state at the time of the two services to warrant the reasonable conclusion that it was exposing itself to the jurisdiction of this state. The creation of a base of operations in a leased office, the installation and actual use of phone service and the advertising of the corporation's presence strongly suggest its availability for commercial activity in Milwaukee.

Although Exhibit F to the Vaughn affidavit is averred to have been circulated "to the trade" on information and belief, the face of that exhibit shows that Milwaukee was the place to which business inquiries were to be sent. This averment has not been contradicted by the

defendants. One of the Kelly affidavits states that if any inquiries were received at the Milwaukee office, he supplied information; but if anyone wanted to place an order, he directed them to be sent to the home office in Virginia. I find it difficult to interpret this to mean that the president of this newly-created corporation failed to engage in enthusiastic sales work, but, rather, referred the prospective purchaser to the Virginia office. This would scarcely be expected or reasonable for a man who for much of the previous thirty years had been in sales work.

Counsel for Graham-White Sales Corporation argue that the company was not doing business at the time of service, having only a barren obligation to pay rent on the leased premises after May 15, 1957. The record fails to support this position. There was no effort to close the office or end the lease. The hiring of a telephone answering service does not show an intention to abandon the office or the doing of business; on the contrary, it is consistent with the preservation and continuation of the business.

Under the applicable rules of law, the defendant Graham-White Sales Corporation was amenable to service in Wisconsin on May 24, and June 3, 1957. *International Shoe Co. v. State of Washington* (1945), 326 U.S. 310; *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.* (1909), 141 Wis. 70, 73; *Behling v. Wis. Hydro-Electric Co.* (1957), 275 Wis. 569.

The special appearance of the co-partners is well-taken. There is not an adequate showing that the Graham-White Manufacturing Company had engaged Kelly as their agent. The contract between the two firms which is annexed to the affidavit of Frantz does not warrant the conclusion that an officer of the Graham-White Sales Cor-

poration is an agent for purposes of service of the Graham-White Manufacturing Company. Since neither the partners themselves nor an appropriate agent was served with process, there is no basis for jurisdiction over the co-partners. The partnership, as an entity, is not amenable to service. *Ausen v. Moriarity* (1954), 268 Wis. 167, 173.

II. Limitation of Discovery

The discovery demands attached to the summons are broad in their scope, but they are consonant with the objects of the action delineated in the affidavit accompanying the summons and appear relevant thereto.

There has been no showing by any of the defendants that the proposed examination of Kelly is not reasonably within the contemplation of section 326.12.

Plaintiff's counsel may present an appropriate order for signature. The proposed order shall be exhibited to defendants' counsel at least three days before its submission to the court.

/s/ Myron L. Gordon
Circuit Judge

Dated at Milwaukee, Wisconsin, this 15th day of August, 1957.

SUPREME COURT, U. S.
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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 297

GRAHAM-WHITE SALES CORPORATION, a foreign corporation, and D. ALLCOTT KELLY as President of Graham-White Sales Corporation,

Appellants,

vs.

THE PRIME MANUFACTURING COMPANY, a corporation,

Appellee.

On Appeal from the Supreme Court of the State of Wisconsin

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 297

GRAHAM-WHITE SALES CORPORATION, a foreign corporation, and D. ALLCOTT KELLY, as President of Graham-White Sales Corporation,

Appellants,

vs.

THE PRIME MANUFACTURING COMPANY, a corporation,

Appellee.

On Appeal from the Supreme Court of the State of Wisconsin

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal of appellants from the judgment of the Supreme Court of Wisconsin entered February 4, 1958 be dismissed on the grounds that (1) the judgment appealed from is not final, (2) the federal question sought to be reviewed was not timely or properly raised, or expressly passed on, and (3) the question is so unsubstantial as not to warrant further argument.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported in 3 Wis. (2d) 156, and in 87 N.W. (2d) 788, and is reprinted in the Appendix to the Jurisdictional Statement. The opinion of the trial court is not reported but is reprinted in the Appendix to the Jurisdictional Statement.

JURISDICTION

Appellants attempt to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2). For the reasons set forth herein the appeal should be dismissed. In addition, this is not an appropriate case for certiorari.

STATUTE INVOLVED

The pertinent provision of the Wisconsin statute in point (Wis. Stats. (1957), § 262.09(4)) is set forth in the Jurisdictional Statement on page 3.

QUESTIONS PRESENTED

If a federal question has been properly raised and presented the Jurisdictional Statement does not accurately state it. We restate it as follows:

> Does submitting a foreign corporation to state jurisdiction by upholding service of process upon its President, who is a resident of and who was personally served in the state, violate the Due Process Clause of the Fourteenth Amendment when at the time of service, the corporation (1) maintained an office in the state occupied by its President and his personal secretary from which it was ready and equipped to accept and act upon any order or busi-

ness which might come into the office, (2) placed and received many local and long distance phone calls and telegrams through the office phone listings, (3) advertised that all business inquiries should be directed to said office, and the office was not closed nor had the business activities ceased at the time summons was served?

In addition, appellee by its motion to dismiss raises the following issues:

(1.) Is the judgment appealed from "final" for the purposes of appeal under 28 U.S.C. § 1257(2)?

(2.) Was the federal question sought to be reviewed timely and properly raised?

(3.) Was the federal question passed on by the Wisconsin Supreme Court?

(4.) Is a substantial federal question presented?

STATEMENT OF THE CASE

A restatement of the case is required by the incomplete presentation of appellants. Hereafter appellants will be sometimes referred to as "Sales Corporation" and "Kelly" respectively, and appellee as "Prime".

This action was commenced by Prime, a Wisconsin corporation having its principal place of business in Milwaukee, against Kelly, the Sales Corporation and others by service of summons on Kelly, as an individual and as President of the Sales Corporation, on May 24, 1957 and on June 3, 1957 (Appel. Brief p. 4). On June 7, 1957 appellants appeared specially and moved to quash service of summons in so far as it purported to confer jurisdiction over the Sales Corporation, a Virginia corporation

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(R. pp. 41-42). The trial court on August 22, 1957, after hearing testimony and receiving affidavits and other evidence, entered an order denying the motion to quash (R. p. 37).

Thereafter, pursuant to Wis. Stats. (1957), § 274.33(3) providing that an order which "decides a question of jurisdiction" is appealable when made, appellants appealed to the Wisconsin Supreme Court, which affirmed (Appel. Appex. p. 18). Both the trial court and the Wisconsin Supreme Court held that the activities of the Sales Corporation in Wisconsin were sufficient to constitute "doing business" for the purpose of service of process under Wis. Stats. (1957), § 262.09(4) (Appel. Appex. pp. 18, 19).

Prime has for many years engaged in the business of selling equipment to various railroads. For a long time prior to March 15, 1957, Kelly was employed by Prime as "assistant to the president" and was in charge of selling said equipment (R. pp. 46, 78). On March 15, 1957 Kelly terminated his employment with Prime (R. p. 81).

The Sales Corporation was incorporated in Virginia in August of 1956 and Kelly at the time of service was President and a director (R. pp. 42-43, 48). The initial and only business of the Sales Corporation was the selling of railroad and related equipment (Ex. C., R. p. 58; Ex. D., R. pp. 59-60; Ex. F., R. p. 165), such equipment being exactly the same as that sold by Prime under Kelly's supervision (Ex. G., R. p. 66). To further this purpose, Kelly and the Sales Corporation by a lease dated August 20, 1956 rented a suite of offices in a building at 759 North Milwaukee Street in Milwaukee, Wisconsin for an original term of three years from October 1, 1956 to September 30, 1959, with option to renew for successive

three year periods (R. p. 95; Ex. 7, R. p. 99). Prior to the time of service of process the only known physical office space rented and occupied by the Sales Corporation was that located in Milwaukee (Ex. F, R. p. 165; R. p. 79).

Sometime after January 1, 1957 the suite was occupied by personnel and a typewriter and some office furniture and crates were moved in (R. pp. 96-97). At the time summons was served, the furniture was still there, the rent was being paid and the lease was in full force and effect (R. p. 97). The only known employees of the Sales Corporation at that time were Kelly, its President, and Miss Peplowski, personal secretary to Kelly, both of whom resided in Milwaukee and worked in said suite, and both former employees of Prime who went directly to said suite from the employ of Prime on or shortly after March 18, 1957 (R. pp. 44, 50, 52-53, 83).

On February 1, 1957 telephone service was installed in the leased premises with listings indicating several office phones and a business address of 759 North Milwaukee Street, and directions to call Kelly's residential listing (WOodruff 2-2737) if no answer was received at the business listing. On March 21, 1957 the Telephone Company placed Graham-White Sales Company in the classified list under "Railroad Supplies". On March 25th the listing of the Sales "Company" was changed to Graham-White Sales Corporation. (R. pp. 92-93). The telephone service and listing were still in effect at the time summons was served (R. p. 93). The Telephone Company records disclosed that five local calls were made from the telephones in the office at 759 North Milwauke Street in the month of March 1957, that seventy-five local calls were made from the same in the month of April,

and that forty-seven local calls were made in May, 1957, the month summons was first served (R. p. 100).

Also, numerous long distance calls were made and received and telegrams sent under these listings during March and April (R. pp. 89-92) and May, 1957 (R. p. 88). On April 22, 1957 the Sales Corporation also put in a telephone answering service for the business listing, which was still connected as of the date of the hearing (R. p. 94).

By letter dated March 25, 1957 from Kelly, customers were advised to address all orders to Graham-White Sales Corporation, Salem, Virginia (Ex. D, R. pp. 59-60). However, an advertisement of the Sales Corporation published on March 24, 1957, and sent to the trade shortly thereafter, expressly offered the sale of railroad equipment, and expressly indicated that *all* inquiries should be addressed to 759 North Milwaukee Street, Milwaukee, Wisconsin (Ex. F., R. p. 165; R. p. 55). Of the ten offices listed, only the Milwaukee office was identified by address and telephone number, or was encircled on the advertisement (Ex. F., R. p. 165).

Kelly by affidavit stated that if any inquiries were received at the Milwaukee office he supplied information, but if anyone wanted to place an order, he directed them to be sent to the home office in Virginia (R. pp. 44-45, 82-83, 84). As to this, the trial court found (Appel. Appex. p. 20):

> "I find it difficult to interpret this to mean that the president to this newly-created corporation failed to engage in enthusiastic sales work, but, rather, referred the prospective purchaser to the Virginia office. This would scarcely be expected or reasonable for a man who for much of the previous thirty years had been in sales work."

And the Wisconsin Supreme Court said (Appel. Appex. p. 17):

> "The Sales Corporation was ready to accept, and had equipped and manned itself so that it could accept, and act upon, any order or business which might come into the [Milwaukee] office."

Kelly also alleged, by affidavit, that all activities of the Sales Corporation in the Milwaukee office, except payment of rent, ceased prior to May 15, 1957 (R. p. 44), although Kelly and Miss Peplowski were physically present in the office on May 26, 1957 (R. p. 50). The trial court, in this respect, made the following finding (Appel. Appex. p. 20):

> "Counsel for Graham-White Sales Corporation argue that the company was not doing business at the time of service, having only a barren obligation to pay rent on the leased premises after May 15, 1957. The record fails to support this position. There was no effort to close the office or end the lease. The hiring of a telephone answering service does not show an intention to abandon the office or the doing of business; on the contrary, it is consistent with the preservation and continuation of the business."

The Wisconsin Supreme Court sustained this finding (Appel. Appex. pp. 17, 17-18) as follows:

> "There is no showing that it attempted to close the office or discontinue the telephone service; both the lease and the telephone service were in effect at the time of the hearing.
>
> * * *
>
> "So far as the installation of a telephone answering service is concerned, the trial court correctly observed that the use of such a service is not indicative of an intention to abandon the office or the business, but is consistent with the continuation of the business. It is not denied that the advertisement, Exhibit F,

> was a publication 'to the trade,' as alleged in the affidavit of plaintiff's secretary; the advertisement directs that all inquiries be addressed to the Milwaukee office. There is no evidence of any publication to the trade advising that the Milwaukee office is closed and that inquiries should be addressed elsewhere. Kelly admits in one of his affidavits that he used the office and the telephone service in handling inquiries addressed there."

The above statements by the two Wisconsin courts represent findings of fact, and this Court, in the absence of exceptional circumstances not here existing, accepts the state courts' findings and conclusions of fact. *Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952); *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *Portland R. Co. v. Railroad Commission,* 229 U.S. 397, 412 (1913). Furthermore, such findings are amply supported in the record. See, in addition to the evidence set out above, the affidavits of Vaughan, Secretary of Prime (R. pp. 46-55; R. pp. 67-71), and the affidavit of Wild, President of Prime (R. pp. 71-76). Therefore, at the time summons was served, the Milwaukee office was open for business and the Sales Corporation was ready to accept and act upon any order or business which might come into the office (Appel. Appex. p. 17).

Appellants on February 21, 1958 filed a motion for rehearing with the Wisconsin Supreme Court in which it was contended that the Court's decision "violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution" (R. p. 175). The motion was denied by the Court on April 8, 1958, without comment upon the constitutional issue raised (R. p. 197).

REASONS FOR GRANTING THE MOTION TO DISMISS

1. The judgment appealed from is not "final".

In Wisconsin an action is commenced by the service of summons (Wis. Stats. (1957), § 262.01), and it is not necessary to serve a copy of the complaint with the summons (Wis. Stats. (1957), § 262.05). Appellants, prior to service of a complaint, moved to quash service of summons, whereupon affidavits were received and testimony heard by the trial court. Upon denial of the motion to quash, appellants immediately appealed to the Wisconsin Supreme Court, which affirmed. The appeal was taken pursuant to Wis. Stats. (1957), § 274.33(3) which makes many interlocutory and intermediate orders appealable when made, including all that decide a question of jurisdiction.[1] The fact that Wisconsin allows an immediate appeal whenever a lower court enters an order which decides a question of jurisdiction, does not make the decision of the Wisconsin Supreme Court "final" under 28 U.S.C. § 1257(2).

The ultimate test of finality is formulated by this Court, not by the law of the state wherein the judgment is rendered. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942); *Richfield Oil Corp. v. State Board*, 329 U.S. 69,

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[1] § 274.33(3) reads in part:

"The following orders when made by the court may be appealed to the supreme court:

* * *

"[3] When an order grants, refuses, continues or modifies a provisional remedy or grants, refuses, modifies or dissolves an injunction, sets aside or dismisses a writ of attachment, grants a new trial or sustains or overrules a demurrer, decides a question of jurisdiction, determines an issue submitted under s. 263.225, or denies an application for summary judgment, * * *."

72 (1946); *Cole v. Violette,* 319 U.S. 581, 582 (1943). This Court has said that the state court judgment must be final in two respects to be within the appellate jurisdiction under 28 U.S.C. § 1257(2). "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Comm.,* 324 U.S. 548, 551 (1945). More specifically, it is generally held that the state court judgment must be final as to all parties, *Meagher v. Minnesota Thresher Co.,* 145 U.S. 608, 611 (1892), and as to all legal and factual issues, *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 68 (1948).

Here the Wisconsin Supreme Court merely affirmed an order denying a motion to quash summons in so far as it purported to confer jurisdiction over the Sales Corporation. There has been no objection to service upon Kelly, individually, who is also a party. Thus the judgment does not and could not determine the rights of all parties. Furthermore, at present no pleadings are on file and no issues, other than jurisdiction over the Sales Corporation, have been raised or decided. The effect of the Wisconsin Supreme Court decree is simply to allow the case to proceed to trial on the merits, and then only if Prime files a complaint setting forth a cause of action, to which appellants may respond by the way of motion or answer.

Under these circumstances, it is quite obvious that the judgment appealed from is not an "effective determination of the litigation", but is merely interlocutory in nature. Therefore, the judgment is not "final" for the purposes of appeal under 28 U.S.C. § 1257(2).

2. The federal question sought to be reviewed was not timely or properly raised.

Appellants contend (Appel. Brief p. 8) that the federal question under consideration was "expressly" raised in their briefs on appeal to the Wisconsin Supreme Court. In their original brief the only reference made to the issue is the argument that "a contrary ruling such as affirming the trial court would violate the rights of the Sales Corporation under the Federal Constitution" (R. p. 28). In their reply brief (R. p. 157) the contention is made that the facts "cannot on this record constitutionally support a finding that the Graham-White Sales Corporation was doing business in Wisconsin on said dates, a prerequisite to jurisdiction."

Aside from the fact that briefs and oral arguments before state courts are not ordinarily part of the record before the Court and cannot be used to establish that a federal question was raised[2], suffice it to say that an attack upon a statute on the ground that it is in violation of the "Constitution of the United States", without further specification, does not properly raise a federal question. *Herndon v. Georgia,* 295 U.S. 441, 442-443 (1935); *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, 248 (1902). As stated in *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897), "the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right".

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[2]See: *Lynch v. New York,* 293 U.S. 52, 54 (1934); *Live Oak Ass'n. v. R. R. Comm.,* 269 U.S. 354, 358-359 (1926); and *Zadig v. Baldwin,* 166 U.S. 485, 488 (1897).

The federal question was first "expressly" raised, if at all, by appellants in their motion for rehearing and the brief in support thereof before the Wisconsin Supreme Court (R. pp. 175, 180). The Wisconsin Court denied the motion for rehearing without referring to the federal question (R. p. 197). Thus as in *Herndon v. Georgia,* 295 U.S. 441, 443 (1935), "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." See also *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945). Furthermore, the present case does not fall within the exception to this rule, namely, that the question first arose from an unanticipated disposition of the case at the close of the proceedings in the highest state court. See *Saunders v. Shaw,* 244 U.S. 317, 320 (1917). It can hardly be argued that appellants were not bound to anticipate the decision of the Wisconsin Supreme Court or lacked opportunity to assert the federal question when the Court merely affirmed the findings of the trial court.

But assuming arguendo that appellants did "expressly" bring the federal question sought to be reviewed to the attention of the Wisconsin Supreme Court, the record fails to disclose that the question was raised in any manner whatsoever before the trial court. In Wisconsin questions as to constitutionality of a statute not raised in the trial court cannot be considered by the state Supreme Court. *Dostal v. Magee,* 273 Wis. 228, 77 N.W. (2d) 604, 607 (1956). This Court has held that when required by state practice, the federal question must be raised before the trial court in order to confer jurisdic-

tion on appeal to this Court under 28 U.S.C. § 1257(2). *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 308-309 (1903); *Edelman v. California,* 344 U.S. 357, 358 (1953); *Bailey v. Anderson,* 326 U.S. 203, 206 (1945); *Memphis Gas Co. v. Beeler,* 315 U.S. 649, 651 (1942).

Therefore, the federal question sought to be reviewed was not properly or expressly raised in the courts below, and, if raised at all, it was presented too late to be considered by either the Wisconsin Supreme Court or by this Court.

3. The federal question was not passed on by the Wisconsin Supreme Court.

Appellants attempt to avoid a dismissal on the grounds that the question was not timely or properly raised by maintaining that the Wisconsin Supreme Court "passed upon and decided the issue" to the extent required under 28 U.S.C. § 1257(2) (Appel. Brief p. 8). It has been held that where the highest state court expressly considers and determines the question, this Court will assume that the federal issue was properly raised. *Saltonstall v. Saltonstall,* 276 U.S. 260, 267-268 (1928); *Charleston Ass'n. v. Alderson,* 324 U.S. 182, 185-186 (1945).

In its opinion the Wisconsin Supreme Court, applying the tests of "doing business" for the purposes of jurisdiction over a foreign corporation set forth in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), said "The facts in this case do not warrant any suggestion of 'unfair play'" (Appel. Appex. p. 16). Appellants apparently contend that this statement by the Wisconsin Court amounts to a determination of the federal question now raised (Appel. Brief p. 8).

However, it is obvious that the Wisconsin Supreme Court in making the statement was saying only that the present case comes within the "liberalized" test of "doing business" as defined in *International Shoe* (see Appel. Appex. pp. 15-16). There is no indication that the Court expressly considered and determined the federal question as now presented. This is apparent from the manner in which the Court stated the only issue involved. It said (Appel. Appex. p. 14):

> "The question is whether at the time of the service of the summons in this action on D. Allcott Kelly, as president of the Graham-White Sales Corporation — May 24, 1957 or June 3, 1957 — the corporation was doing business in Wisconsin."

It then held that the activities of the Sales Corporation constituted "at least the 'very little more' than the maintenance of an office for convenience in the solicitation of orders, required under the rule" stated in an annotation in 146 A.L.R. 961 (see Appel. Appex. pp. 16, 18).

This holding is fully supported by the record and acts as an adequate independent non-federal ground, sufficient to bar review. *Radio Station WOW v. Johnson,* 326 U.S. 120, 129 (1945). Furthermore, even if the statement of the Wisconsin Court relied on by appellants is viewed as a determination of the federal issue, though not properly raised, there has been no showing that the statement was necessary to the determination of the cause, or that the judgment as rendered could not have been given without deciding it. See *Honeyman v. Hanan,* 300 U. S. 14, 21 (1937). Therefore, the fact that the Court below applied the doctrine of *International Shoe* and suggested that the facts "do not warrant any suggestion of 'unfair play' ", does not cure appellant's failure to timely and properly raise the federal question now sought to be reviewed.

Appellants further maintain that in Wisconsin any challenge by a foreign corporation to delivery of a summons on the basis that the foreign corporation was not doing business in Wisconsin "necessarily draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States if applied to the challenging corporation" (Appel. Brief p. 6), and that "any decision of a Wisconsin Court holding that a foreign corporation 'is doing business in Wisconsin at the time of service' * * * *necessarily* draws in question the validity of the statute under federal due process and decides in favor of its validity" (Appel. Brief pp. 7-8). In effect, appellants take the position that whenever the highest state court renders a decision upholding service of process and relying upon *International Shoe,* it is automatically appealable under 28 U.S.C. § 1257(2), even though the federal question of validity of the state statute as applied is not properly raised or decided. This represents much too broad a view of this Court's jurisdiction on appeal. It may be that an appeal will lie even though the state court is not explicit in overruling a timely challenge on federal grounds to the validity of the state statute, but the challenge itself must be explicit. And appellant's contention is entirely inconsistent with the fundamental rule that the federal claim and the grounds therefor must be brought to the state court's attention, *Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928), and/or passed on, neither of which was done here.

We therefore submit that the federal question now before the Court was neither considered nor decided by the Wisconsin Supreme Court and appellants' contentions to the contrary are unsound.

4. A substantial federal question is not presented.

It has been fully demonstrated above that appellants are not properly before this Court. In addition, it can be argued that, in any event, the question as phrased by appellants (Appel. Brief p. 3) provides no basis for review because it does not draw into question the validity of the state statute. See and compare: *Philadelphia & Reading C. & I. Co. v. Gilbert,* 245 U.S. 162, 165-166 (1917) and *Dahnke-Walker Co. v. Bondurant,* 257 U.S. 282, 289, 299 (1921). However, regardless of any of the above, the actual question presented (see pp. 2-3, supra) however worded is insubstantial and that alone is cause for dismissal of the appeal and denial of certiorari. *Zucht v. King,* 260 U.S. 174, 176 (1922); *Palmer Oil Corp. v. Amerada Corp.,* 343 U.S. 390, 391 (1952).

Appellants base their argument that the question is substantial on two grounds, (1) that the "Wisconsin courts did not and could not find on the basis of this record that appellee's cause of action arose out of contacts in Wisconsin," and (2) that the record fails to disclose "anything inconsistent with the contention that the Sales Corporation had ceased doing business in Wisconsin before delivery of the summons to Kelly" (Appel. Brief p. 9) .

As to the first, the fact that the Wisconsin courts did not find that the cause of action arose out of corporate activities in Wisconsin is of no significance. We repeat, no complaint setting forth a cause of action is yet on file. If and when pleadings are filed it may very well appear that the cause of action arose out of Wisconsin activities (see affidavit of Vaughan, R. pp. 39-41). This in and of itself would be sufficient to support service of summons under Wis. Stats. (1957), § 262.09(4)(b). Further-

more, it cannot be said that the activities of the Sales Corporation in Wisconsin failed to represent substantial contacts with the state, regardless of where the cause arose.

As indicated by the trial court, it is clear that the President of the Sales Corporation was personally served within the state. We are not dealing with the case of service upon a minor sales representative or a subordinate official (Appel. Appex. p. 19). Nor are we dealing with a situation where the corporation was served in a state other than that where suit was commenced. It is undisputed that Kelly, the President, and Miss Peplowski, the only known employees of the Sales Corporation, resided in Wisconsin and were actively engaged in the pursuit of business activities on behalf of the Sales Corporation in the state. A suite of offices was rented in Milwaukee in the name of the Sales Corporation under a relatively long term lease. The suite was equipped with a typewriter and office furniture and was occupied by personnel. Telephone service was installed in the leased premises with listings under "Railroad Supplies" in the classified section of the local telephone book. Prospective callers were referred to Kelly's Milwaukee residential phone number if no answer was received at the office listing. Numerous phone calls, both local and long distance, were made and received, and telegrams sent. Significantly, the only known physical office space rented and occupied by the Sales Corporation was that located in Milwaukee. Moreover, an advertisement published and circulated to the trade expressly directed *all* inquiries to the Milwaukee office, and Kelly admitted that he used the office and telephone service in handling such inquiries.

The trial court found that "The creation of a base of operations in a leased office, the installation and actual use of phone service and the advertising of the corpora-

tion's presence strongly suggest its availability for commercial activity in Milwaukee" (Appel. Appex. p. 19). The Wisconsin Supreme Court said that "The Sales Corporation was ready to accept, and had equipped and manned itself so that it could accept, and act upon, any order or business which might come into the office" (Appel. Appex. p. 17). In addition to all this, Kelly, a Wisconsin resident and President of the Sales Corporation and former trusted employee of Prime, and a man highly experienced and successful in the field of selling railroad equipment, organized the Sales Corporation and directed all its affairs. It must therefore be concluded that, under the circumstances above recited, the Sales Corporation had ample contacts with the state to allow service of summons upon its President in Wisconsin without offending the traditional notions of fair play. *International Shoe Co. v. Washington,* 326 U.S. 310, 317-320 (1945); *McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957). And this is so whether or not the record at present indicates that the cause of action arose out of the corporation's activities in the state of the forum. *Perkins v. Benquet Mining Co.,* 342 U.S. 437, 445-448 (1952).

Secondly, the argument that the Sales Corporation ceased doing business in Wisconsin before delivery of summons to Kelly was fully argued and rejected by both courts below. The trial court after hearing testimony and receiving evidence found that "The record fails to support this position" (Appel. Appex. p. 20) and the upper court agreed (Appel. Appex. p. 17, 18). Both courts emphasized that there was no effort to close the office or end the lease, or to discontinue the telephone service (Appel. Appex. pp. 17, 20). Furthermore, although the Sales Corporation advised customers to direct all inquiries to the Milwaukee office, there is no evidence of any pub-

lication to the trade advising that the Milwaukee office was closed and that inquiries should be addressed elsewhere (Appel. Appex. p. 18). These facts plus the affidavits of the Secretary and of the President of Prime (R. pp. 46-55; 67-71; 71-76) fully support the finding that the Sales Corporation at the time summons was served was ready and equipped to accept, and act upon, any order or business which might come into the office (Appel. Appex. p. 17). Obviously, appellant's contention that the record fails to disclose anything inconsistent with their assertion that the Sales Corporation had ceased doing business in Wisconsin by May, 1957 is unjustified and unsound.

Therefore, this court is confronted with a decision of the Wisconsin Supreme Court which is not only consistent with due process as defined by this Court, but is fully supported by the evidence and case law. Viewed in this manner, there is little doubt that if appellants raise a federal question, they present one of no substance and absolutely devoid of merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed, and certiorari denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 297

GRAHAM-WHITE SALES CORPORATION, a foreign corporation, and D. ALLCOTT KELLY, as President of Graham-White Sales Corporation,

Appellants,

vs.

THE PRIME MANUFACTURING COMPANY, a corporation,

Appellee.

On Appeal from the Supreme Court of the State of Wisconsin

REPLY TO APPELLEE'S MOTION TO DISMISS

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REPLY TO APPELLEE'S MOTION TO DISMISS

Appellee charges that the Appellants' statement of the case is incomplete. Appellants' statement was prepared so as not to burden this Court with facts not material on this appeal. Many such extraneous facts are included in Appellee's restatement of the case.

Appellee also asserts in its restatement that a certain statement in the written opinions of the Trial Court and Wisconsin Supreme Court constitutes a finding of fact

which must be accepted by this Court. The statement is that the installation of a telephone answering service is not indicative of an intention to abandon the office or the business but is consistent with the continuation of business.

We submit that this statement is a legal conclusion in this particular case which begs the federal issue presented by this appeal. A determination of the federal issue depends primarily upon whether the Sales Corporation *ceased* having sufficient contacts in Wisconsin for purposes of state jurisdiction even though a telephone answering service referred all persons calling leased space in a Milwaukee office building *to the corporate office in the State of Virginia.*

Appellee, in effect, would make the highest state court the final authority in this field of federal constitutional law. To prevent such result, this Court ascertains for itself the facts disclosed by the record when reviewing an issue of jurisdiction over a foreign corporation. *Consolidated Textile Co. v. Gregory,* 289 U.S. 85, 86 (1933), *Truax v. Corrigan,* 257 U.S. 312, 324-325 (1921).

I.

The question presented is substantial.

Sufficient contacts must exist *at the time of the service of the summons* to comply with federal due process in this case. See *Conley v. Mathieson Alkali Works,* 190 U.S. 406 (1903), *Consolidated Textile Co. v. Gregory,* 289 U.S. 85, 88 (1933) and §262.09(4)(a). It was on this basis that the question presented on this appeal was drafted as set forth in the Jurisdictional Statement.

We wish to emphasize that the Wisconsin courts, and the question presented as redrafted by Appellee, overlook

the time factor which is all-important in this case. The record discloses, without dispute, that *at the time of the attempted service of process* all telephone inquiries to the leased Milwaukee office were automatically referred by telephone answering service to the corporate offices located in the State of Virginia and that all inquiries mailed to such Milwaukee office were immediately sent by the postal authorities to the same offices in Virginia. This, with Mr. Kelly's uncontradicted sworn statement (R. p. 44-45), conclusively establishes a cessation of business activity in the State of Wisconsin notwithstanding the observation of the Wisconsin Supreme Court that there was no publication to the trade advising that the Milwaukee office was closed and that inquiries should be addressed elsewhere. The response to mail and telephone answering arrangements obviously advised the trade that the Milwaukee office was not open for business.

A corporation ceasing to do business in a state perhaps normally should actually have its telephone instruments disconnected. However, by the outstanding and published telephone directory in general use at the time unanswered telephone callers were directed to Kelly's residence. To obviate the problem presented the modern means of a telephone answering service was retained to have such inquiries automatically referred to the Virginia office. Kelly had the right to continue to reside in Milwaukee without rendering the corporation amenable to service of process. *Conley v. Mathieson Alkali Works,* 190 U.S. 406, 411 (1903) and *Riverside Mills v. Menefee,* 237 U.S. 189, 194-195 (1915). He also was not required to have his residential telephone disconnected and a change in his private number would not have solved the problem presented by the telephone directory then in use. Obviously the best method available to handle the situation

was to install a telephone answering service directing callers to Virginia, which was done.

Nor does the fact the lease remained outstanding demonstrate that the Sales Corporation had not ceased business activity in Wisconsin. See *Davega, Inc. v. Lincoln Furniture Mfg. Co.*, 29 F (2d) 164, 166 (2d Cir. 1928). Under the lease Kelly and the Sales Corporation remained liable for the payment of rent until the premises were sublet to third persons, which required the consent of the lessor.

The burden was upon Appellee to show that the Sales Corporation was doing business in Wisconsin *at the time of the service of the summons* so as to confer jurisdiction upon the Wisconsin Courts under §262.09(4)(a). Appellee failed to carry such burden, and the legal conclusions drawn by the Wisconsin Courts to "correct" such omission were erroneous. The judgment of the Wisconsin Supreme Court holding the Sales Corporation amenable to service of process under the circumstances certainly presents a substantial federal question for review by this Court.

Appellee's motion to dismiss is premised upon three additional arguments. We will refute them herein in the order presented by Appellee.

II.

The Judgment appealed from is "final" within the meaning of Title 28 USC §1257.

Appellee contends that the judgment of the Wisconsin Supreme Court is not "final" for the purposes of appeal under 28 USC §1257(2). Appellee in effect argues that the Sales Corporation must either (a) submit to a trial on the merits, whereby the federal question on

jurisdiction may be waived under Wisconsin practice and not be subject to review by this Court*, or (b) suffer a default judgment in the Wisconsin Courts and then raise the federal issue on appeal to this Court from such default judgment.

We earnestly submit that the Sales Corporation should not be required to permit entry of default judgment against it or defend on the merits as a condition to review by this Court of the federal issue. Requiring the Sales Corporation to *defend* on the merits at this time would contravene and thwart the basic underlying reason for the "minimum contacts—fair play" rule and this appeal. Such reason was well stated by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) at page 317:

> "To require the corporation in such circumstances to *defend the suit away from its home* or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with *due process.* (Italics supplied)

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*The Wisconsin Supreme Court in *Corbett v. Physicians Casualty Association*, 135 Wis. 505, 115 N.W. 365 (1908) held that a defendant who makes *any appearance*, including going to trial on the merits under protest, after an objection to jurisdiction over his person is overruled waives the jurisdictional issue. The Wisconsin courts are very strict in applying this rule, which may be validly applied by state courts after appeal on the jurisdictional issue to an appellate court and even though a contrary rule of practice prevails in the federal courts. *Western Indemnity Co. v. Rupp*, 235 U.S. 261, 272-273 (1914).

However, the federal question then would not be reviewable here, the situation apparently being within the settled rule that this Court will not review a state court judgment resting on an adequate and independent non-federal ground even though the state court may also have summoned to its support an erroneous view of federal law. See *Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945) wherein this Court refused to review a federal question involving jurisdiction of the Federal Communications Commission because the right to contest the issue was waived under state procedure.

In any event, for purposes of review the judgment appealed from should be treated as the equivalent of a refusal by the Wisconsin Supreme Court to issue a writ of prohibition.

A state court judgment refusing a *writ of prohibition* to prevent the exercise of jurisdiction over a foreign corporation is final for purposes of review by this Court under *28 USC §1257. St. Louis B & M Ry. v. Taylor,* 266 U.S. 200 (1924), see also *Bandini v. Superior Court,* 284 U.S. 8, 14 (1931) and *Madruga v Superior Court,* 346 U.S. 556 (1954). The writ formerly was available to obtain review by the Wisconsin Supreme Court and subsequent review by this Court of an objection by a foreign corporation to jurisdiction. See *Petition of Inland Steel Co.,* 174 Wis. 140, 182 N.W. 917 (1921) and *Consolidated Textile Co. v. Gregory,* 289 U.S. 85 (1933). However, this avenue for review by this Court of the federal question was not open to Appellants because Wisconsin Statute §274.33(3) was amended effective September 1, 1956, to make orders which "decide a question of jurisdiction" directly appealable. The extraordinary writ of prohibition is not available in Wisconsin under such circumstances. *State ex rel Joyce v. Farr,* 236 Wis. 323, 295 N.W. 21 (1940) and *State ex rel Fieldhack v. Gregorski,* 272 Wis. 570, 76 N.W. (2d) 382 (1956).

We submit that, in view of all the circumstances, the judgment appealed from is final for purposes of review by this Court under Title 28 USC §1257.

III.

The Federal question was passed on by Wisconsin Supreme Court.

Appellee also contends that the question sought to be reviewed was not timely or properly raised. We believe it unnecessary to labor the point since Appellee correctly concedes (Brief, p. 13) that where the highest state court expressly considers and determines the question, this Court will assume that the federal issue was properly raised. *Saltonstall v. Saltonstall,* 276 U.S. 260, 267-268 (1928) and *Charleston Ass'n. v. Alderson,* 324 U.S. 182, 185-186 (1945).

Appellee, however, also contends that the Wisconsin Supreme Court did not pass on the federal question. In so doing Appellee overlooks the fact, as noted on page 6 of our Jurisdictional Statement, that the Wisconsin Supreme Court stated in the instant case:

> "In the recent case of *Behling v. Wisconsin Hydro Electric Co.* (1957), 275 Wis. 569, 572, 573, 575, N.W. (2d) this court, stating that 'Questions of jurisdiction acquired by the service of process on a foreign corporation depend upon whether or not there has been compliance with the due-process provision of the federal constitution, regarded as controlling *International Shoe Co. v. Washington* * * *.'"

(Appendix A, p. 15, R. p. 172)

We also wish to reiterate the argument advanced on pages 5-8 of the Jurisdictional Statement, that any decision of the Wisconsin Supreme Court deciding whether a foreign corporation is "doing business in Wisconsin at the time of service" as required under §262.09(4)(a) *necessarily* passes upon the federal question. The statute is treated by the Wisconsin Supreme Court as being co-

extensive with and requiring no more than federal due process (*Huck v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 4 Wis. 2d 132, 137, 90 N.W. 2d 154, 157-158), which also is a complete answer to Appellee's contention that the appeal must be dismissed because any decision by the Wisconsin Supreme Court upon the federal issue was unnecessary to a determination of the cause.

The Wisconsin Supreme Court concluded its opinion as follows:

> "These activities constitute at least the 'very little more' than the maintenance of an office for convenience in the solicitation of orders, required under the rule, and the trial court was warranted in holding that the Sales Corporation was amenable to service in Wisconsin on May 24 and June 3, 1957."

(See Appendix A, p. 18, R. p. 174)

Appellee erroneously contends that this statement acts as an adequate independent non-federal grounds sufficient to bar a review. However, application in any particular case of the non-federal "rule" referred to by the Wisconsin Supreme Court is not necessarily adequate, and always is subject to review in cases of this type on the basis that such application violates minimum federal constitutional requirements. Appellee's contention again (a) begs the very question upon which Appellants seek review by this Court, and (b) would make the highest state court the final authority in this field of federal constitutional law.

CONCLUSION

For the reasons advanced herein and in the Jurisdictional Statement, it is respectfully submitted that Appellee's Motion to Dismiss should be denied. A substantial federal question is properly presented for review by this Court on appeal or by way of certiorari as authorized under Title 28 USC §2103.

Respectfully submitted,

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